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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 339 85,

THE OHIO OIL COMPANY, PLAINTIFF IN ERROR,

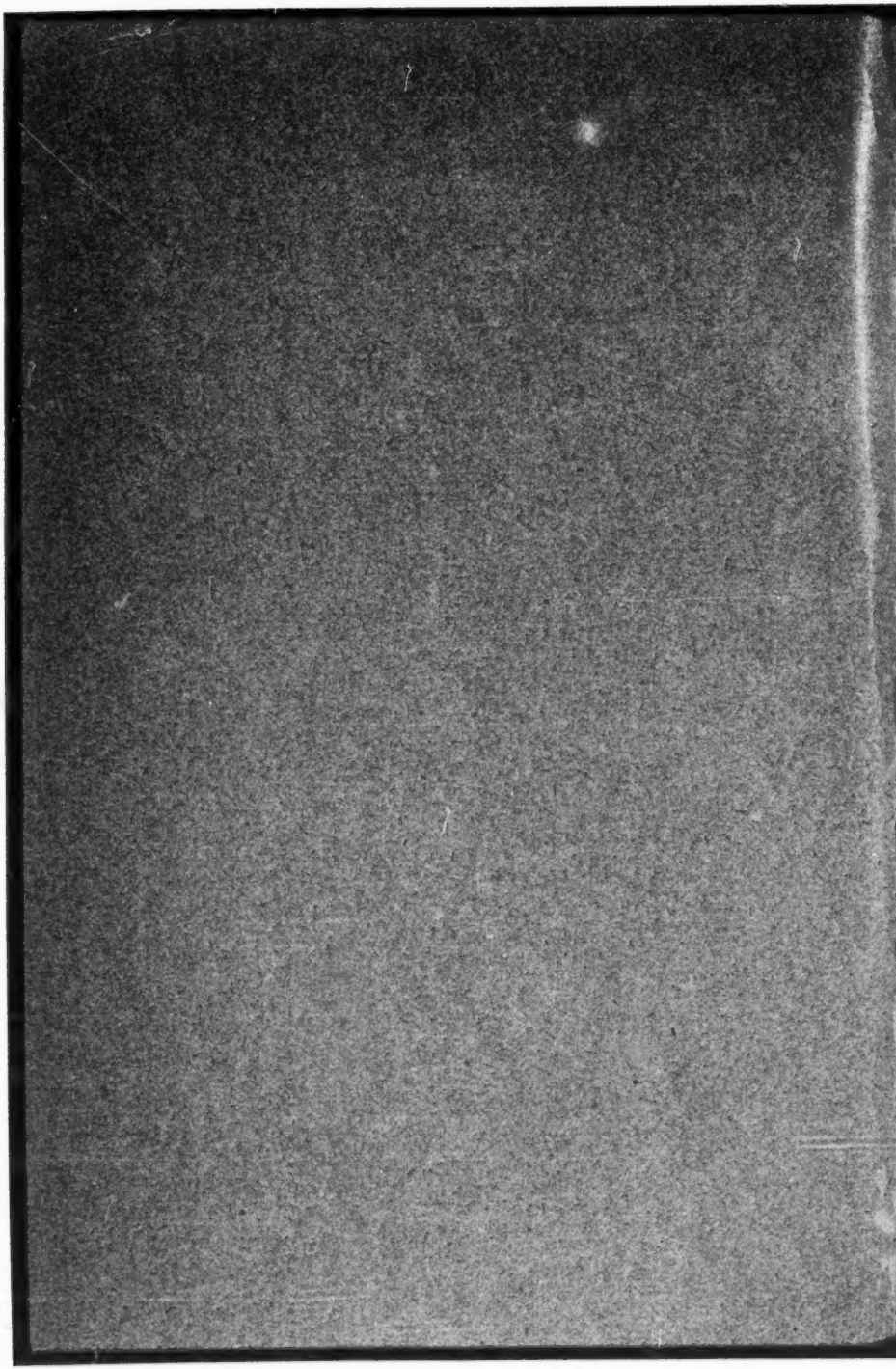
vs.

THE STATE OF INDIANA, FOR THE USE OF MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED MAY 27, 1898.

(16,894.)



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(16,894.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 310.

THE OHIO OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA, FOR THE USE OF MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1898.

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1 On the 21st day of April, 1898, M. F. Elliott and Stephenson, Shirts & Fertig, attorneys for the appellant, The Ohio Oil Company, filed in the clerk's office of the supreme court of Indiana the following præcipe in words and figures, to wit:

THE STATE OF INDIANA:

In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON County. } No. 18601.

The clerk will please make out complete transcript in above cause, including copy of opinion referred to as the one upon which this cause is decided.

April 21, 1898.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Att'ys for Appellant.

2 STATE OF INDIANA, *ss:*

Supreme Court.

Be it remembered that heretofore, to wit, on the 20th day of April, 1898, the Ohio Oil Company, by its attorneys, M. F. Elliott and Stephenson, Shirts & Fertig, filed in the office of the clerk of the supreme court of Indiana a transcript of the record and proceedings of the Madison circuit court of said State, wherein The State of Indiana, for the use of Madison County, was plaintiff and The Ohio Oil Company was defendant, together with an assignment of errors, joinder, and agreement to submit endorsed thereon; which transcript, assignment of errors, joinder, and agreement to submit are in the words and figures following, to wit:

3 Pleas before the Honorable John F. McClure, sole judge of the Madison circuit court of the county of Madison, in the county of Madison, at a term begun, held, and continued in the court-house, in the city of Anderson, commencing on the first Monday in September, 1898.

Transcript.

No. 12822.

STATE OF INDIANA, } *ss:*
Madison County, }

Be it remembered that heretofore, to wit, on the 16th day of August, 1897, a complaint was filed in the office of the clerk of the Madison circuit court of the county of Madison, in the State of Indiana, wherein The State of Indiana, for the use of The County of

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Madison, is plaintiff and The Ohio Oil Company is defendant; which complaint is in the words and figures following, to wit:

STATE OF INDIANA, } ss:
Madison County, }

Madison Circuit Court, September Term, 1897.

THE STATE OF INDIANA, for the Use of Madison County, *vs.* THE OHIO OIL COMPANY. } Complaint to Recover Penalty for Violation of Law.

The State of Indiana, for the use of The County of Madison,
4 in said State, complains of the defendant, The Ohio Oil Company, a corporation duly organized under the laws of the State of Ohio and doing business under such corporate name in the State of Indiana and in Madison county, therein, and says that heretofore, to wit, on the 24th day of July, 1897, the said defendant had the possession and control of a natural-gas and oil well situated on the following-described real estate, in Madison county, in the State of Indiana, to wit: The east half (½) of the northwest quarter (¼) of section sixteen (16), township twenty-one north, range eight east; that *they are* the owners, managers, and in control
Complaint. of said gas and oil well on the date aforesaid; that on said date *they* had drilled and completed said well and had struck gas and oil therein; that the said defendants did then and there unlawfully allow and permit the flow of gas in great quantities, to wit, two millions cubic feet per day, to escape from said oil well while the same was under the management and control of the said defendant; that since the discovery of oil in said well, on the 25th day of July, 1897, the defendant has made no effort to confine said gas within such well or in the proper pipes or tanks or in any safe receptacle whatever, but *they have* unlawfully, knowingly, and willfully allowed and permitted the flow of natural gas from said well in the quantities aforesaid to escape into the open air for more than two days next after gas and oil were struck in said well, contrary to the form of the statutes in such cases made and provided.

The plaintiff further says that a right of action has accrued to the plaintiff to have and recover from the defendant, for the use of said Madison county, the sum of two hundred dollars, together with costs and reasonable attorneys' fees; that a reasonable attorneys' fee for the recovery of said penalty is fifty dollars.

Wherefore plaintiff demands judgment for the use of the county of Madison on this paragraph of complaint — the sum of two hundred and fifty dollars and the costs and all other necessary and proper relief.

5 Paragraph 2nd.

The State of Indiana, for the use of The County of Madison, complains further of the defendant, the aforesaid Ohio Oil Company, and says that on the 24th day of July, 1897, the defendant was the

owner and had the possession of a natural-gas and oil well situate on the following-described real estate, in Madison county and the State of Indiana, to wit: The east half (½) of the northwest quarter (¼) of section sixteen (16), township twenty-one (21) north, range eight (8) east; that on said day they had drilled said well and had struck gas and oil therein; that for more than ten days next after the two days allowed by law for the securing and confining of said gas and oil in said well the said defendant unlawfully allowed and permitted the flow of natural gas in great quantities, to wit, two million cubic feet per day, to escape into the open air without being confined within such well or proper pipes or other safe receptacle, contrary to the form of the statutes in such cases made and provided.

Complaint.

And the plaintiff avers that a right of action has accrued to the plaintiff to have and recover from the defendant, for the use of said Madison county, the sum of two hundred dollars ($200.00), together with costs and reasonable attorneys' fee for the recovery of said penalty, — is fifty dollars ($50.00).

Wherefore plaintiff demands judgment on this paragraph of complaint in the sum of two hundred and fifty dollars ($250.00), and on both paragraphs of this complaint in the sum of five hundred dollars ($500.00), and all other necessary and proper relief.

DANIEL W. SCANLAN,
Prosecuting Attorney.

6 Afterwards, to wit, on the 2nd day of April, 1898, the same being the 24th judicial day of the March term, 1898, of the Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL COMPANY.

Come the parties, by counsel, and the defendant files its demurrer to each paragraph of complaint herein in these words, to wit:

Demurrer to Complaint.

STATE OF INDIANA, *Madison County,* } *set:*

THE STATE OF INDIANA
vs.
THE OHIO OIL COMPANY.

The defendant, The Ohio Oil Company, demurs to each paragraph of complaint herein, and for cause of demurrer says that neither paragraph thereof states facts sufficient to constitute a cause of action.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Defendant.

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Which demurrer is overruled by the court; to which ruling of the court the defendant excepts, and the defendant now files its answer herein in these words, to wit:

7 *Answer.*

STATE OF INDIANA, } ss:
Madison County, }

THE STATE OF INDIANA }
vs.
THE OHIO OIL COMPANY. }

Now comes the defendant, The Ohio Oil Company, and for its answer to the complaint herein says it is a corporation duly organized under the laws of Ohio and duly complied with all the laws of Indiana with respect to doing business in this State before the bringing of this suit; that this action is prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4th, 1893; which said act is in these words:

"An act concerning the sinking, safety, maintenance, use, and operation of natural-gas and oil wells, prescribing penalties and declaring an emergency.

(Approved March 4, 1893.)

Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural-gas and oil wells; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural-gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles.

SECTION 2. Whenever any well shall have been sunk for
8 the purpose of obtaining natural gas or oil, or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been 'shot' there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt-water level, where

salt water has been struck; where no salt water has
Answer. been such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with the diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been 'shot,' the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet about the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball eight inches in diameter shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

9 SECTION 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which said violation shall continue; and all such penalties shall be recoverable in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit.

SECTION 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon
Answer. the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in the State against the owner, lessee, agent or manager of said well, and each of them jointly and severally to cover the cost and expense of such tubing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SECTION 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well

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and plug or fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporation so failing, jointly and severally, to recover the costs and expenses of such plugging and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act."

This defendant, further answering, says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

Answer. The defendant admits that it drilled the well complained of herein, but *said* that said well — so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same as so constructed and operated is not dangerous to life or property.

That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner the stipulated royalties therefor, and so operated the same with knowledge, approbation, and consent of such land-owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

That in said well and in the same strata of rock whence such oil was produced there *was* also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the

world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed and the people of said county and State will be deprived of the use *of the use* and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

Answer.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

12 That in the territory where said well complained of is situate there are a number of paying oil wells, owned and operated by various persons and corporations, and said field when properly developed may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county.

This defendant further alleges that said act of the General Assembly of the State of Indiana, as above set out, violates the fourteenth amendment of the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws.

Answer.

Wherefore defendant prays judgment for its costs and all other proper relief.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Defendant.

And the plaintiff now files its demurrer to the answer herein in these words, to wit:

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Demurrer to Answer.

STATE OF INDIANA, } ss:
Madison County, }

Madison Circuit Court.

STATE OF INDIANA, for the Use of MADISON COUNTY, }
vs.
THE OHIO OIL COMPANY. }

Demurrer to answer.

The State of Indiana demurs to the answer of the Ohio Oil
13 Company upon the ground that said answer does not state facts sufficient to constitute a cause of defense.

W. A. KETCHAM,
Attorney General.

MERRILL MOORES,
C. C. SHIRLEY,
Of Counsel for the State of Indiana.

Sustained.

Which demurrer is sustained by the court; to which ruling of the court the defendant excepts; and the defendant refusing to plead further, the court now renders judgment herein.

It is therefore considered, ordered, and adjudged by the court that the plaintiff have and recover of the defendant the sum of four hundred dollars ($400.00) as damages and the further sum of one hundred dollars ($100.00) as and for attorneys' fees, in all the sum of five hundred dollars ($500.00), and likewise all its costs and charges herein in this cause laid out and expended and taxed at $—.

Certificate.

STATE OF INDIANA, } ss:
Madison County, }

In the Madison Circuit Court.

STATE OF INDIANA, for the Use of MADISON COUNTY, }
vs.
THE OHIO OIL COMPANY. }

I, Edmund Johnson, clerk of the Madison circuit court of the county of Madison, in the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the order-book entries, papers and pleadings, rulings of the court, and the objections and exceptions thereto in the above-entitled cause, as the same appear of record and on file in my office.

14 In testimony whereof I have hereunto affixed the seal of said court and subscribed my name, at Anderson, Indiana, this 18th day of April, 1898.

[SEAL.] (Signed) EDMUND JOHNSON, *Clerk.*

15 *Assignment of Errors.*

THE STATE OF INDIANA:

In the Supreme Court.

THE OHIO OIL COMPANY, Appellant,
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY, Appellee.

The appellant, The Ohio Oil Company, says there is manifest error in the proceedings and judgment in the foregoing cause, in this, namely:

1. The court erred in overruling the demurrer separately to each paragraph of the complaint.

2. The court erred in sustaining the demurrer to the answer.

For which errors appellant prays the judgment be in all things reversed.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Appellant.

Joinder.

The appellee says there is no error in the record.

W. A. KETCHAM,
Attorney General.

C. C. SHIRLEY,
MERRILL MOORES,
Of Counsel for the State.

Agreement to Submit.

It is agreed that this cause may be submitted.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
For Appellant.
W. A. KETCHAM, *Attorney General.*
MERRILL MOORES,
C. C. SHIRLEY, *Of Counsel.*

16 And on April 20, 1898, appellant, by counsel, files its brief in this cause herein.

And on the same day the appellee, by counsel, files its brief in the above-entitled cause herein.

And thereupon appellant's counsel file a motion to advance and joinder.

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And on April 21, 1898, the court advanced the cause herein.

And on April 21st, 1898, being the 130th judicial day of the November term, 1897, the court, being advised in the premises, affirms the above-entitled cause, with an opinion *per curiam*, in the words and figures as follows:

Opinion.

THE OHIO OIL CO.
vs.
THE STATE OF INDIANA. } No. 18601.

From the Madison circuit court.

Per Curiam:

The questions presented by the record in this case are identical with some of the questions considered and decided in the case of The State *vs.* Ohio Oil Co., — Ind., —; 49 N. E. Rep., 809, and on the authority of that case the judgment herein is affirmed.

16½ It is therefore considered by the court that the judgment of the court below in the above-entitled cause be in all things affirmed at the cost of the appellant; all of which is ordered to be certified to said court.

And it is further considered by the court that the appellee recover of the appellant the sum of $— for its costs and charges in this behalf expended.

17 THE STATE OF INDIANA
vs.
THE OHIO OIL CO. } No. 18476.

From the Madison circuit court.

MCCABE, *J.*:

The State of Indiana, by her attorney general and the prosecuting attorney in the Madison circuit court, brought suit against the appellee, The Ohio Oil Company, seeking to enjoin it from wasting natural gas.

The circuit court sustained the defendant's demurrer to the complaint for want of sufficient facts to constitute a cause of action, and, the plaintiff electing to abide said demurrer and refusing to amend its complaint or to plead further, the court rendered judgment that the plaintiff take nothing by its complaint, and that defendant recover costs. Upon this ruling alone the State assigns error.

The substance of the complaint is that for many years heretofore there has been underlying Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties in Indiana a large deposit of natural gas, utilized for fuel and light by the people of those counties and of many other counties and cities in Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Lafayette, and others of the most populous cities of the State, to which cities the gas is conducted, after being brought through

wells to the surface of the ground, by pipes and conduits, by means of which many hundreds of thousands of the people of Indiana are supplied with gas for light and fuel. The natural gas underlying the counties named and other portions of Indiana is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure and from which it escapes, when permitted to do so, with great force. The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural-gas deposit to the State and its citizens is many millions of dollars. Since the discovery of the gas deposit in 1886 vast sums of money have come into the State and have been invested in building up large manufacturing interests, and vast sums of
18 money belonging to the people of Indiana have been invested in similar enterprises, causing a great increase of population, principally in the territory underlying which gas is found. Many cities in and adjacent to the gas territory, including those named, are almost wholly dependent for fuel supply upon natural gas, and for that reason the people of Indiana have become and are greatly interested in the protection and continued preservation of the gas supply. Many millions of dollars invested in manufacturing and other properties in and near the gas territory are wholly dependent for their continued operation and for the permanent value of their property upon the gas supply. Their location and establishment in the gas territory was due to the presence of natural gas underlying it, without which such enterprises could not be operated at a profit, and in the event that the supply of gas is exhausted in the territory many of such manufacturing enterprises (in which thousands of citizens of Indiana find employment at remunerative wages) will be compelled to suspend operations. Their employés will be thrown out of employment and many of them, being wholly dependent upon their labor for support, may and will become charges upon the State and its municipal subdivisions. The property of the manufacturing enterprises and the vast investments depending on them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now invested in these enterprises. In the cities named and in all the territory known as the "gas belt" the inhabitants have for years used practically no other fuel than natural gas. Their houses in many instances are constructed with a view to the use of natural gas and will have to be differently equipped before other kinds of fuel can be used. The cost of natural gas as fuel to the people in the gas belt, who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and to the other inhabitants of the State using natural gas it has become and is a source of great convenience, comfort, and increased happiness because of its cheapness, convenience, and cleanliness as fuel. Many small villages in and near the gas territory have within a few years become flourishing and opulent cities. The State's wealth and its revenues derived from taxation on

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-count of such increased population and the various interests
19 that have been fostered and supported by natural gas *ahev*
been greatly increased, and will, in the event gas is exhausted, be correspondingly curtailed. The State of Indiana, relying upon the permanent supply of gas, has, at great expense, equipped many of its public institutions, including the state-house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the Institution for the Care of the Orphans of American Soldiers and Sailors, and other public institutions owned and maintained by the State of Indiana and its various subdivisions, together with the court-houses in many counties and a vast number of public schools, for the use of natural gas as fuel, by which the cost of maintaining the public buildings and institutions named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased. Natural gas exists in large reservoirs, or a series of reservoirs connected with each other, underlying the gas territory, and the diminution or consumption of natural gas taken from any part of them affects or reduces correspondingly the common supply. If the gas supply is accordingly husbanded and protected it will last for many years and continue to supply the various interests named with abundant fuel, and the population, wealth, and other material interests of the State will continue to be benefitted and enhanced, and the comfort, enjoyment, and happiness of the people of the State greatly increased.

It is charged that about May 25th, 1897, the Ohio Oil Company, an Ohio corporation, as its name implies, caused a well to be drilled near Alexandria, Madison county, which produces natural gas and petroleum in large quantities. The location of this well is described, as well as that of five other wells drilled at about the same time as the one first named, all of which produce both natural gas and petroleum, and have done so ever since their completion. It is charged that, instead of securely anchoring the wells as drilled, so as to confine the gas produced by them within two days next after their completion, the defendant, ever since the completion of the wells, which have been completed for some time, has "unlawfully per-
mitted the gas produced therein to flow and escape into the
20 open air, whereby many millions of cubic feet of natural gas have been wasted and lost, and whereby the State's supply of natural gas has been greatly diminished, and the property of its citizens within the said gas territory dependent upon the continued supply of natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value." It is also charged that the defendant avows its purpose to permit the gas to escape continuously and indefinitely hereafter from said wells, and refuses to make any effort to confine it, and declares its purpose to drill other wells in the gas territory, and permit the gas therefrom to flow and escape into the open air, and that if the gas continues to flow from the wells the supply of natural gas upon which the citizens of the State depend will be greatly diminished; that the pressure of gas as found in said Trenton rock will be greatly diminished, and that

by the diminution of such pressure water will accumulate in the rock stratum and ultimately and entirely displace and overcome the gas supply; that because of the wrongful acts of the defendant above described heretofore committed and now continuing its property and that of its citizens has been and will continue to be essentially interferred with, and the comfortable enjoyment of the lives of its citizens greatly interrupted; and plaintiff avers "that it has no adequate remedy at law for the redress of its grievances complained of; that it is impossible accurately to fix in dollars and cents the damage the plaintiff has sustained and will sustain by reason of the wrongful and unlawful acts of the defendant, if suffered to continue, and that the plaintiff's injuries on account thereof are and will be great and irreparable, and increase as said gas is permitted to flow and the number of wells wherein the same is unconfined continues to increase, and that the ordinary remedies, though repeatedly resorted to by plaintiff, have proved ineffectual to restrain or check the wrongful action of defendant."

It is charged that the penalties provided by law for the unlawful acts above described are whol-y inadequate, and that the defendant has openaly defied and continues to defy the lawfully constitute d authorities of the State in their efforts to enforce and recover in t he name of the State the penalties provided by law for such wrongfu l acts committed by the defendant, and the injunctive relief is nec - essary in order to restrain the continued wrongful acts of the de-
fendant, and that, unless the same is given, one of the greatest
21 natural resources of the State will be ultimately destroyed; that in order to obtain even a partial and inadequate remedy for the wrong done a multiplicity of suits must be resorted to, entailing great expense and affording no considerable relief, unless the defendant is restrained and prohibited by injunction from doing the things complained of.

It is therefore prayed that upon final hearing the defendant and its agents, servants, and employés be perpetually enjoined and prohibited from further suffering and permitting the natural gas produced in said wells or any of them to escape from them, and that the defendant be ordered and directed forthwith to securely confine the same, either by anchoring each of the wells or by confining the gas in tanks, pipes, or other proper receptacles, and that failing to do so the sheriff of Madison county be ordered to anchor, secure, and confine the natural gas in each of said wells, and that the expense of such anchoring be taxed as part of the cost of suit.

It is intimated by appellee's learned counsel that the State has nor right to maintain such a suit; but whether it be on account of lack of capacity to sue or simply because the complainant does not state facts sufficient is not made plain by the argument of appellee's counsel. If it was the intention to question the capacity of the State to sue, counsel should have embraced in the demurrer the second statutory ground for demurring, namely, "that the plaintiff has not legal capacity to sue." Sec. 342, Burns' R. S., 1894 (sec. 339, R. S., 1881; *ib.*, Horner's R. S., 1897).

But the courts of the State and United State- are open to the State,

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both in its sovereign capacity and by virtue of its corporate rights, in both of which characters it sued here.

Indiana *vs.* Kentucky, 136 U. S., 479.
Indiana *vs.* Woram, 6 Hill, 33; 40 Am. Dec., 378.
State *vs.* Portsmouth Savings Bank, 106 Ind., 435.
State *vs.* Adams Express Co., 144 Ind., 549.
Adams Express Co. *vs.* Indiana, 165 U. S., 255.
State *vs.* Chicago & E. I. R. R. Co., 145 Ind., 229.
State *vs.* Union Nat'l Bank of Muncie, 145 Ind., 537.
State *vs.* Western U. Tel. Co., 146 Ind., 54.
23 Am. & Eng. Ency. of Law, p. 80.

22 The appellee contends that "the question of the exhaustion of the gas is certain, according to the averments in both the injunction cases, and the question therefore is, Who shall be permitted to exhaust it?" "The State contends," says appellee, "that the manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company who is also using gas for the purpose of a legitimate business. In such matters of private concern the State has no interest and should not have any."

It is true the production of oil is a legitimate business; but the waste and destruction of natural gas, which appellee's demurrer admits it is engaged in, defiantly, constantly, and in utter contempt of the laws of Indiana and the welfare and comfort of its citizens, is not only not a legitimate business, but has been placed under the ban of two prohibitory statutes in this State. Secs. 2316-2318, Burns' R. S., 1894 (Acts 1891, p. 55; Acts 1893, p. 300). Section 1 of the latter act provides "that it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles."

The constitutionality of the latter act is assailed by the appellee; but the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in Townsend *vs.* State, — Ind., —, 47 N. E., 19, for every conceivable constitutional objection and for every objection urged to the act now under consideration, and this court in that case upheld the constitutionality of that act.

It is asserted with great confidence that the gas in or under the appellee's land is a part of the land, and that it is a reasonable
23 use thereof to mine for the oil therein, even though gas is thereby incidentally wasted by permitting its escape into the open air, and that a statute prohibiting such a reasonable use is unconstitutional, and several Pennsylvania and Ohio cases are cited,

together with one from New York and one in West Virginia, to the effect that petroleum is a mineral, and while it is in the earth it is a part of the realty, and that when it reaches a well and is produced on the surface it becomes personal property and belongs to the owner of the well. It is therefore argued that natural gas is likewise a part of the land in or under which it is found, and that the owner of the land may and has a lawful right to assert absolute dominion over all that is found in or under his land to the center of the earth and for an unlimited distance upwards from the surface. The force of these authorities depends entirely upon the analogy between oil or petroleum and natural gas in or under the land. It must be confessed that there is a marked difference between these two sub-tances in their nature. This court has likened natural gas as to its property characteristics to fish in the waters and wild game in the forest before taken and reduced to possession.

Townsend *vs.* State, *supra*, and cases there cited.

But appellee's learned counsel rely on a quotation made by this court in the latter case from the Pennsylvania supreme court and which had in a gas case been previously quoted by this court—the People's Gas Co. *vs.* Tyner, 131 Ind., 281. That quotation is as follows: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' They belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas so that it comes into his well and under his control, it is no longer yours but his."

24 The part of this quotation that seems favorable to appellee's contention is this: "They (the water, gas, and oil) belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner is gone." This much of the quotation was not adopted as law by this court in either of the cases in which the quotation is found. On the contrary, in the latter case, this court said: "By the Tyner case, 131 Ind., 281, 282, this court likened natural gas and laws regulating the same to wild animals and laws regulating the taking of such animals. The supreme court of Minnesota, in State *vs.* Rodman, 58 Minn., 393, having under consideration the constitutionality of a certain game law of that State, said: 'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common. The preservation

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of such animals as are adapted to consumption as food or to any other useful purpose is a matter of public interest, and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession;'" and this court in the same case also likened natural gas and its characteristics as property to fish and the laws regulating the taking thereof. There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found or in the waters of which the fish are found, and there is no such thing in such laws to the effect that after the title has once vested by actual reduction to possession that the same may wander off and vest in some one else. To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all the analogies of the law than to say that wild animals or fowls in "their fugitive and wandering existence" in passing over the land become the property of the owner of such land, or that fish in their passage up or down a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land is a part of the land and is the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the act from which we have quoted is not violative of the constitution as an unwarranted interference with private property.

But appellee's counsel contend that a proper construction of the act makes it wholly inapplicable to the subject of this suit, the prevention of the waste of gas; that it does not apply to a well unless it endangers persons or property. It is not in the language of the act that counsel claim to find this meaning, but they claim to find it in the preamble thereto, reading thus: "Whereas great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use, and operation of natural gas and oil wells, therefore," etc. It is not claimed, as it cannot with reason be, that the language of the act is either ambiguous or doubtful in its meaning. It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; and if, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one,

effect is to be given to it, notwithstanding the less extensive import of the preamble.

23 Am. & Eng. Ency. of Law, 331, 332, and authorities there cited.
Holbrook *vs.* Holbrook, 1 Pick., 251.
Erie, etc., R. R. Co. *vs.* Casey, 26 Pa. St., 288.
Yazoo, etc., C. Co. *vs.* Thomas, 132 U. S., 174.
26 Hughes *vs.* Done, 1 Q. B. (1 A. & E. N. S.), 301.

In Yazoo, etc., Co. *vs.* Thomas, *supra*, the Supreme Court of the United States said: "The preamble to the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one 'of great public importance' and 'to be encouraged by legislative sanction and liberality,' and 'that the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins or other alluvial lands herein referred to are such that no private company has so far been able to establish a railroad and branches, developing said basins and alluvial lands and connecting them with the railroad systems of the country;' but as the preamble is no part of the act and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."

We have no doubt, from the language of the act and the circumstances surrounding its enactment, that the chief object in the passage thereof was to prevent the waste of natural gas.

23 A. & Eng. Ency. of Law, 335, 336.
Edger *vs.* The Board, 70 Ind., 331.
Stout *vs.* Board, 107 Ind., 343.
May *vs.* Hoover, 112 Ind., 455.
Hunt *vs.* R. R. Co., 112 Ind., 69.

It is contended that the act does not apply to appellee's case, because it was intended, as is claimed, to apply only to wells producing oil alone and to wells producing gas alone and not to what counsel call combination wells, producing both oil and gas, as is the case with the appellee's wells, as disclosed in the complaint. At the time of the passage of the act the chief waste of natural gas which was going on and had been for some time, as shown by the Eleventh Annual Report of the United States Geological Survey for 1889–1890 and the current history of the times, resulted from what counsel term combination wells, producing both oil and gas; the waste from wells producing gas alone was small in compari-
27 son with that from such combinations wells. In the light of these historical facts it would be extremly absurd to suppose that the legislature intended to prevent waste only by closing the spigot and leaving the bung wide open; but even the language of the statute forbids such construction. The act made unlawful by the express words of the section quoted is "to allow or permit the

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flow of gas or oil from any such well to escape into the open air." In this sentence there is but one well spoken of. The prohibition is against the escape of gas, and it is undeniable that it is equally against the escape of oil, and it is equally clear that the prohibition against the escape of both relates to the same well, and therefore, if they are both permitted to escape from the same well, the permission of the escape of each is made unlawful by the section quoted. Had the statute made the violation thereof a crime, would any rational being contend that an indictment charging the accused with permitting both oil and gas to escape from such well would not be good? Certainly not.

It is next contended that there is not authority or right of action in the State at common law, and especially that the State cannot maintain a suit in equity, either under the statute or at common law. This being a suit in equity, as the law existed prior to the adoption of the civil code of 1852, if the objection last mentioned be well taken, it is fatal to the complaint.

The reason assigned in argument why the State cannot maintain the action for an injunction is that the statute provides a different remedy, namely, the recovery of a penalty of $200.00 for each violation of the act, and a further penalty of $200.00 for each ten days during which such violation shall continue, to be recovered in a civil action in the name of the State, for the use of the county in which such well is located, with attorneys' fees and costs of suit; and another remedy provided in another section of the act is that certain persons in the vicinity are authorized to go upon the land where any well is situate, from which gas or oil is allowed to escape in violation of the act, and shut up the same and pack and tube said well so as to prevent *to* escape of gas or oil, and maintain a civil
28 suit against the owner for the costs of such closing of said well, with attorneys' fees and costs of suit; but this court has gone much further than to hold that the fact that the civil remedy given to recover penalties and the other remedies for violations of the act does not bar the right to an injunction.

In the case of The People's Gas Co. *vs.* Tyner, *supra*, it was said: "No authority has been cited and we know of none supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself and not sustained by the public in general."

In that case it was held that the extraordinary equitable remedy by injunction could be invoked by a private citizen, even though the act to be enjoined was made a crime by statute; and the same rule was applied in The Columbian Athletic Club *vs.* The State, 143 Ind., 98, where this court said: "Extraordinary emergencies in many cases call for extraordinary remedies. * * * The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham, 'that it is the duty of courts in equity (and the same is true of all courts and all institutions) to adapt its prac-

tice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which, the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy.' This rule, the author (Judge Redfield) concludes, is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America."

Our code provides that " whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as ennentially to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an ac-
29 tion. * * * The nuisance may be enjoined or abated and damages recovered therefor " (§§ 290, 292, Burns' R. S., 1894; §§ 289, 291, R. S., 1881; *ib.*, Horner's R. S., 1897). The facts alleged in the complaint show that the acts of the appellee are such as to essentially interfere with the comfortable enjoyment of life and the property of the citizens of the State.

The supreme court of Kansas, in State *vs.* Crawford, 28 Kansas, 720, said: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." The demurrer to the complaint admits that the wells of the appellee are in this catagory.

The supreme court of California, in a suit by the attorney general to enjoin the Truckee Lumber Company from discharging sawdust into the Truckee river with the effect of destroying the fish therein, in sustaining the action, which is closely ananagous to this action, *the court* used the following language, which we adopt: "It is alleged that the acts of the defendant have the effect of poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or any considerable number of persons' is a public nuisance. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the State (*Ex parte* Maier, 103 Cal., 476; 42 Am. St., 129), as in England it was in the King, and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law and preserved and expressly provided for by the statutes of this and every other State in the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and impaired, and that such acts constitute a nuisance, both under our statute and at com-
mon law, is not open to serious question (People *vs.* Elk River,
30 etc., Co., 107 Cal., 219; 48 Am. St., 121). * * * The dominion of the State for the purpose of protecting its sovereign rights in the fish within its waters and their preservation for

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the common enjoyment of its citizens is not confined within the narrow limits suggested by the defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the State, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the State. * * * While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. * * * The fact that acts of the character alleged are by the penal code made a misdemeanor and punishable as such does not make them less a nuisance nor imply that the legislature intended to make the criminal remedy exclusive of the civil; nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information without the intervention of a private relator." People *vs.* Truckee Lumber Co., 116 Cal., 397. The same doctrine is laid down in—

People *vs.* City of St. Louis, 10 Ill., 351.
Commonwealth *vs.* Pittsburgh, etc., R. R. Co., 24 Pa. St., 159.
State *vs.* Matschan (Ore.), 46 Pac., 791.

In the 24 Pa. St. case, *supra*, it was said: "The matter complained of is an invasion of a public highway, and it must be enjoined against. The defendants are not allowed the excuse that this part of the canal is practically abandoned, for no neglect is chargeable against the State; its officers are insisting on its rights, and it is the merest effrontery in the defendants to set up their views of the need of the canal against the State which thought fit to
31 make it and against the public officers who are entrusted with its custody. It is therefore ordered that an injunction issue."

The State of South Carolina brought suit in one of its courts to enjoin the Coosaw Mining Company from digging, mining, or removing phosphate rock and phosphatic deposits from the bed of the river. On petition of the mining company the case was removed into the circuit court of the United States. From the decree of that court the mining company appealed to the Supreme Court of the United States. That court, in affirming the judgment of the circuit court awarding an injunction, said: "An instructive case upon this subject is Attorney General *vs.* Jamaica Pond Aqueduct, 133 Mass., 361, 363, 364*a*. That was an information in equity in the name of the attorney general to restrain a corporation from doing certain illegal acts, the necessary effects of which would be not only to impair the rights of the public in the use of one of the great ponds of Massachusetts for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores

slime, mud, and offensive vegetation detrimental to the public health. It was held, upon the authority of numerous cases, American and English, that where the nuisance is a public one an information by the attorney general was the appropriate remedy. After observing that the preventive force of a decree in equity restraining the illegal acts before any mischief was done would give a more efficacious and complete remedy than an indictment or proceedings under a statute for the abatement of the nuisance, the court said: 'There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. * * * If a corporation or an individual is found to be doing acts without right the necessary effect of
32 which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief.' So in Eden on Injunctions: 'The usual and perhaps the more correct mode of proceeding in equity in cases of public nuisance is by information at the suit of the attorney general,' p. 267. Mr. Justice Story said that an information in equity at the suit of the attorney general would lie in cases of purpresture and public nuisance, the jurisdiction of courts of equity being sustained because of 'their ability to give a more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations.'

Eq. Jur., §§ 922, 923, 924.
The People *vs.* Vanderbuilt, 26 N. Y., 287.
District Attorney *vs.* Lynn & Boston R. R. Co., 16 Gray, 242, 245.
Kerr on Injunctions, 262, 263.
1 Joyce on Injunctions, 120.

These principles are applicable to the present case. The remedy at law for the protection of the State in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining, and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust for an indefinite period by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or

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present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are
33 entitled to have is security for all time against illegal interference with the control by the State of the digging, mining, and removing of phosphate rock and phosphatic deposits in the bed of the Coosaw river. Such security was properly given by the decree below. Decree affirmed." Coosaw Mining Co. *vs.* South Carolina, 144 U. S., 566.

Accordingly, in Crawford *vs.* Tyrrell, 128 N. Y., 344, it was held: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained and for an injunction against the continued use of his premises in such a manner." And in Mobile *vs.* Louisville & Nashville R. R. Co., 84 Ala., 115, 126, it was held that "the mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

It has been held that the United States, in its sovereign capacity, may enjoin hydraulic mining to the detriment of navigable streams. United States *vs.* N. Bloomfield Gravel Mining Co., 81 Fed., 243.

In a case where the State officers failed to enforce the law against brokerage in railroad tickets the railroads brought suit in the circuit court of the United States to enjoin the brokerage business as unlawful. The circuit court of the United States for the middle district of Tennessee granted the injunction, and, in answering the objection that such a proceeding was novel and unprecedented, said: "I return, now, to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable
34 remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled and precedent after precedent established from time to time to meet new conditions and to do full justice until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion, regulated by analogy, by what would be manifestly just, in view of all the existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this

the courts have not gone in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive; that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civi-zation. A similar objection that novel use was being made of the writ of injunction was pressed in the case of Toledo, A. A. & N. M. R'y Co. *vs.* Pennsylvania Co., 54 Fed., 751, and was answered by the court as follows: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore in its time without a precedent. If based on sound principles and beneficent results follow their enforcement, affording relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.' Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: 'I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasing complex business relations and the protection of rights can demand.' Mr. Justice Blatchford, speaking for the Supreme Court in Jay *vs.* St. Louis, 138 U. S., 1, said: 'It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation.'" Nashville, C. & St. L. R'y Co. *vs.* McConnell, 82 Fed., 76. To the same effect is our own case of The Columbian Athletic Club *vs.* State, *supra*.

It is true that, as a result of the principles announced in the previous part of this opinion, natural gas, when reduced to actual possession by the land-owner, when drawn into his well, pipes, tanks, or other receptacles, thereby becomes his personal property, subject to his dominion; but, as said by this court in People's Gas Co. *vs.* Tyner, *supra*, "the rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others."

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind.

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But appellee tries to excuse its conduct on the score that it cannot mine and utilize the oil under and in its land without wasting the gas; but there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the
36 storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth.

Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom and utilize it without wasting the oil; but, even if it cannot draw oil from such wells without wasting gas and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana and, in effect, says: "It is my property to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourselves if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State; but we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless.

We therefore conclude that the facts stated in the complaint
37 make a case of public nuisance, which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action; hence the circuit court erred in sustaining appellee's demurrer to the complaint.

The judgment is reversed and the cause remanded with instructions to overrule said demurrer and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

38 And afterwards, to wit, on the 28th day of April, 1898, came the appellant, by counsel, and filed its petition for a writ of error to the Supreme Court of the United States in the words and figures following, to wit:

39 In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON County. } No. 18601.

Now comes the said The Ohio Oil Company and shows to this honorable court that heretofore, to wit, on the 16th day of August, 1897, the said State of Indiana, for the use of Madison County, filed its complaint against said The Ohio Oil Company to recover an alleged penalty for allowing natural gas to escape from certain oil wells owned by the said Ohio Oil Company in said county of Madison, in the State of Indiana, which said action was so brought and prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4, 1893, which said act of the legislature, among other things, required every owner of any natural gas or oil well to confine the gas within such well within two days after the same should have been struck in the well, and that thereafter all such gas or oil should be safely and securely confined in such well, pipes, or other safe and proper receptacles.

40 That in said circuit court of Madison county, Indiana, upon demurrer to said complaint, the plaintiff in error contended that said act of the General Assembly of the State of Indiana was in violation of the 14th amendment to the Constitution of the United States, in that it takes away the liberty and property of the Ohio Oil Company without due process of law, *by* the circuit court of Madison county adjudged the said act of the legislature of Indiana to be not in violation of said 14th amendment to the Constitution of the United States and overruled the demurrer to said complaint.

That afterwards, on the 2nd day of April, 1898, said The Ohio Oil Company filed its answer in said case showing that the said act of the legislature of Indiana was in violation of the Constitution of the United States in this, that the enforcement of said statute operated to deprive said The Ohio Oil Company of its property, to wit, the oil in said lands and the use thereof, without due process of law, and that the production of oil was an impossibility in said lands without allowing said gas to escape; which answer was in these words:

41 Now comes the defendant, The Ohio Oil Company, and for its answer to the complaint herein says it is a corporation duly organized under the laws of Ohio, and duly complied with all the laws of Indiana with respect to doing business in this State before the bringing of this suit; that this action is prosecuted under and

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by virtue of an act of the General Assembly of the State of Indiana approved March 4th, 1893; which said act is in these words:

42 An act concerning the sinking, safety, maintenance, use, and operation of natural gas and oil wells, prescribing penalties and declaring an emergency.

(Approved March 4, 1893.)

Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and oil wells; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacles for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles.

SEC. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt-water level, where salt water has been struck; where no salt water has been struck such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be

pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball, eight inches in diameter, shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or d-illing taken from the well shall be put on top of said iron ball.

43 SEC. 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and cost of suit.

SEC. 4. Whenever any person or corporation in possession or control of any well in whic- natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly or severally to recover the costs and expense of such tubeing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SEC. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to, or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situated and take possession of such well, and plug and fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporations so failing, jointly and severally, to recover the costs and expense of such plug-ing and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

44 This defendant, further answering, says that before and at the time of the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor into the earth and rock below in said county of Madison, and that in the carrying on of said business it had expended many thousand of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells, and for pipes and pipe lines, all of which it then owned and still owns.

The defendant admits that it drilled the well complained of

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herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing and transporting natural gas in said county, having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same, as so constructed and operated, is not dangerous to life or property.

That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner the stipulated royalties therefor, and so operated the same with the knowledge, approbation, and consent of such land-owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land, granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

45 That in said well and in the same strata of rock whence such oil was produced there *was* also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed, and the people of said county and State will be deprived of use and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil line, and in incurring the liabilities and paying the money

therefor, as hereinbefore alleged, all with the knowledge and acquiescense of the plaintiff and with no notice of knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money has been so expended and after said well had been so completed.

46 That in the territory where said well complained of is situate there are a number of paying oil wells owned and operated by various persons and corporations, and said field when properly developed may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county.

This defendant further alleges that said act of the General Assembly of the State of Indiana, as above set out, violates the fourteenth amendment of the Constitution of the United States, in this: that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the law.

Wherefore defendant prays judgment for its costs and all other proper relief.

47 But the said circuit court of Madison county, Indiana, on the 2nd day of April, 1898, sustained the demurrer to said answer and rendered judgment against said The Ohio Oil Company for the penalty provided by said statute, to wit, in the sum of five hundred dollars. From said judgment of said circuit court said The Ohio Oil Company appealed to the supreme court of Indiana, in which last-named court, on the 21st day of April, 1898, the said supreme court of Indiana affirmed the judgment of the said Madison circuit court, and held and decided that the said act of the General Assembly of the State of Indiana was constitutional in all respects; that said statute was valid and did not deprive the plaintiff in error of the liberty or property without due process of law.

And your petitioner shows to this honorable court that the said several judgments and decrees of said circuit court and of the said supreme court of the State of Indiana are manifestly erroneous in deciding that the said statute of the State of Indiana does not deprive the plaintiff in error of liberty and property without due process of law, and it therefore prays that this honorable court issue its writ of error directed to the honorable the judges of the supreme court of the State of Indiana, requiring them, the said judges, to send up to the Supreme Court of the United States a complete record of the said cause.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Ohio Oil Company.

48 And be it further remembered that on the same day said petition was granted and said writ of error allowed as prayed for by the order of the Honorable Timothy E. Howard, chief justice of said court, made and entered in said cause in these words:

"Allowed by Timothy E. Howard, chief justice of the supreme court of Indiana."

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49 And on the same day came the appellant, by counsel, and filed its certificate of the chief justice of the supreme court of Indiana in the words and figures following, to wit:

50 STATE OF INDIANA, ss:

In the Supreme Court of Indiana.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY. } No. 18601.

I, Timothy E. Howard, chief justice of the supreme court of Indiana, do hereby certify that in the above and foregoing cause, wherein final judgment was rendered in the supreme court of Indiana on the 21st day of April, 1898, that in said cause there was involved, discussed by counsel, and decided by this court the question whether the act of the General Assembly of the State of Indiana, approved March 4, 1893, entitled "An act concerning the sinking, safety, maintenance, use, and operation of natural-gas and oil wells, prescribing penalties and declaring an emergency," was in violation of the 14th amendment to the Constitution of the United States, and that in such decision the supreme court of the State of Indiana in the cause aforesaid and at the time aforesaid held and decided that the said act of the General Assembly was a valid statute and that the same was not in conflict with the 14th amendment to the Constitution of the United States.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court the 28th day of April, 1898.

TIMOTHY E. HOWARD,
[SEAL.] *Chief Justice.*

51 And on the same day came the appellant, by counsel, and filed its citation and service in the words and figures following, to wit:

52 UNITED STATES OF AMERICA:

To the State of Indiana, for the use of Madison County, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Indiana in a cause wherein The Ohio Oil Company is the plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Timothy E. Howard, chief justice of the supreme court of Indiana, this 28th day of April, in the year of our Lord 1898.

TIMOTHY E. HOWARD,
Chief Justice.

Service of foregoing citation is hereby acknowledged.
April 28, 1898.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

53 And on the same day came the appellant, by counsel, and filed its appeal bond herein in the words and figures following, to wit:

54 In the Supreme Court, *ss:*

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON County. } No. 18601.

Know all men by these presents that the undersigned, The Ohio Oil Company, as principal, and George Shirts, as surety, are held and firmly bound unto the State of Indiana, for the use of Madison County, in the sum of twelve hundred ($1,200) dollars upon the following conditions:

That whereas on the second day of April, 1898, *in* the Madison county circuit court, — the said State of Indiana, for the use of Madison County, rendered judgment against the said The Ohio Oil Company in the sum of five hundred ($500) dollars and costs, from which judgment said The Ohio Oil Company appealed to the supreme court of Indiana; and

Whereas on the twenty-first day of April, 1898, the said judgment of the Madison circuit court was affirmed by the supreme court of Indiana, from which said judgment the said The Ohio Oil Company has prayed for a writ of error to the Supreme Court of the United States:

Now, therefore, if said The Ohio Oil Company shall well and truly prosecute its said writ of error to the Supreme Court of the United States and shall pay any judgment that may be rendered by said Supreme Court of the United States in said case, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Witness our hands and seals this 28th day of April, 1898.

THE OHIO OIL COMPANY.
GEO. SHIRTS.

Taken and approved by me this 28th day of April, 1898.

TIMOTHY E. HOWARD,
Chief Justice of the Supreme Court of Indiana.

55 And on the 16th day of May, 1898, came appellant, by counsel, and filed its writ of error herein in the words and figures following, to wit:

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56 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a *a* judgment in a plea which is in the said supreme court, before you, between The Ohio Oil Company and The State of Indiana, for the use of Madison County, a manifest error hath happened, to the great damage of the said Ohio Oil Company, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said [SEAL.] circuit court this 16 day of May, A. D. 1898.

NOBLE C. BUTLER, *Clerk.*

57 And on the same day appellant, by counsel, filed its assignment of errors to the Supreme Court of United States, together with a joinder therein by appellee, in the words and figures following, to wit:

58 In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY. } No. 18601.

Now comes said The Ohio Oil Company and shows the court that there is manifest error in the proceedings and judgment in this case, to wit:

1. The circuit court of Madison county erred in overruling the demurrer to the first paragraph of the complaint.

2. The circuit court of Madison county erred in overruling the demurrer to the second paragraph of the complaint.

3. The circuit court of Madison county erred in sustaining the demurrer to the answer.

4. The supreme court of Indiana erred in deciding that the cir-

cuit court of Madison county committed no error in overruling the demurrer to the first paragraph of the complaint.

5. The supreme court of Indiana erred in deciding that the circuit court of Madison county committed no error in overruling the demurrer to the second paragraph of the complaint.

6. The supreme court of Indiana erred in deciding that the circuit court of Madison county committed no error in sustaining the demurrer to the answer.

7. The supreme court of Indiana erred in deciding that the act of the legislature of Indiana approved March 4, 1893, was not in violation of the 14th amendment to the Constitution of the
59 United States, and erred in deciding that said act of said legislature did not operate to deprive said The Ohio Oil Company of liberty and property without due process of law.

For all of which errors said The Ohio Oil Company prays that said judgment be in all things reversed.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Ohio Oil Company.

The defendant in error, The State of Indiana, for the Use of Madison County, says there is no error in the proceedings and judgment in said cause.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

60 STATE OF INDIANA:

Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of Madison County. } Madison C. C. No. 18661.

I, Alexander Hess, clerk of the supreme court of the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of the record and of all the papers, entries, proceedings, and judgment in the above-entitled cause, together with a full, true, and complete copy of the opinion of said supreme court in this cause and a full, true, and complete copy of the opinion of said supreme court referred to in the opinion in this cause as the one upon which the decision in the above-entitled cause is based; also of the petition for a writ of error, allowance thereof by the chief justice of said court, assignment of errors, joinder, writ of error, citation and service, and appeal bond to the Supreme Court of the United States.

In witness whereof I hereunto set my hand and affix the seal of

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said court, at my office, in Indianapolis, this 20th day of May, 1898.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ALEX. HESS,
Clerk Supreme Court of Indiana.

Endorsed on cover: Case No. 16,894. Indiana supreme court. Term No., 310. The Ohio Oil Company, plaintiff in error, *vs.* The State of Indiana, for the Use of Madison County. Filed May 27th, 1898.

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